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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JERRY JESSIE HERRERA,

Defendant and Appellant.

F041569

(Super. Ct. No. 02-88060)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Tulare County. Elisabeth B. Krant, Judge.

John Hardesty, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Michael A. Canzoneri and Aaron R. McGuire, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Vartabedian, Acting P.J., Harris, J. and Cornell, J.

Defendant Jerry Jessie Herrera appeals from the monetary portions of the sentence imposed upon him after he pleaded no contest to one count of continuous sexual abuse of a child under 14 (Pen. Code, § 288.5 [all further section references are to this code]) pursuant to a plea agreement. We will reverse in part and affirm the remainder of the judgment.

### **Facts and Procedural History**

Defendant sexually assaulted the victim from the time she was three years old through her graduation from high school; the abuse included numerous acts of sexual intercourse. Defendant was charged in a six-count complaint. At the preliminary hearing, he entered into a plea agreement under which he would plead no contest to count one in return for dismissal of the remaining counts (which could be considered at sentencing (*People v. Harvey* (1979) 25 Cal.3d 754) and imposition of the upper term of imprisonment, 16 years.

Before accepting the plea agreement, the trial court advised defendant of the direct consequences of his plea of no contest, including the fact that he “may be ordered to pay a fine in this case of up to ten thousand dollars as well as a restitution fine of between two hundred and ten thousand dollars and restitution to the victim in this case.” Upon defendant’s assertion that he understood all of these consequences, the court accepted the plea agreement and set the matter over for preparation of a probation officer’s report and for sentencing.

Prior to the scheduled sentencing hearing, defendant obtained new counsel and filed a motion to withdraw from the plea agreement. Although the probation officer’s report had already been prepared and included the recommended fines to which defendant now objects, the motion to withdraw the guilty plea was based solely upon the fact that defendant’s mind had been clouded by the stress of the moment and the plea was not free and voluntary.

At a hearing on September 4, 2002, the court denied the motion to withdraw from the plea agreement and proceeded to conduct the sentencing hearing. The court invited defense counsel to comment on the probation officer's report. Although counsel requested corrections to the report (which the court made), there was no objection to the monetary penalties recommended in the report, with one minor exception. When the court noted that the probation officer's report contained a typographical error and intended to recommend \$10,000 as the restitution fine, defense counsel responded: "I would request if the Court would ... consider something in the range of two to five thousand." He did not assert that the plea bargain precluded the imposition of a restitution fine.

The court imposed the upper term of 16 years in prison and, as relevant to this appeal, imposed a restitution fine of \$8,000, an additional restitution fine of \$8,000 (stayed unless defendant's parole is revoked), and the fine of \$200 required by section 290.3, subdivision (a). The court ordered defendant "to pay for the SART exam pursuant to Section 1203.1[h, subdivision] (b); to be paid directly to the investigating law enforcement agency ...."<sup>1</sup>

Defendant filed a timely notice of appeal. He contends the fines were not part of the plea agreement and that he would not have agreed to the deal if he had known about the fines. Separately, he contends the court erred in imposing the open-ended obligation "to pay for the SART exam"; on this score, respondent concedes the order for payment must be stricken.<sup>2</sup>

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<sup>1</sup> "SART" apparently refers to the sexual assault response team.

<sup>2</sup> Defendant also complains about the imposition of a \$110 fine payable to the victims' restitution fund. However, we agree with respondent that no such fine was imposed. Instead, in dismissing a misdemeanor count for which defendant already was on probation, the court *vacated* this previously imposed fine.

## Discussion

Generally speaking, a defendant is entitled to be sentenced in accordance with an accepted plea agreement unless he consents to a different sentence or he is permitted to withdraw from the plea agreement. In addition, a defendant is entitled to be advised of the direct consequences of his guilty plea, and is entitled -- upon timely objection -- to withdraw from the plea agreement if he is prejudiced by the trial court's failure to advise him sufficiently. (*In re Moser* (1993) 6 Cal.4th 342, 350-351.)

Appellant contends (without actually articulating the contention or citing authority for it) that the fines about which he was advised at the change of plea hearing were not a part of the plea bargain. From this premise, he concludes imposition of the fines constitutes reversible error even though he did not object to the fines in the trial court.

The fines were a part of the plea bargain. The section 290.3 fine is required in every case in which a defendant is required to register as a sex offender. As such, it is "an inherent incident of defendant's decision to plead" no contest to a registerable offense. (*People v. McClellan* (1993) 6 Cal.4th 367, 380.) As to the restitution fines, the court expressly advised defendant, prior to the no contest plea, that the plea would subject him to "a fine in this case of up to ten thousand dollars as well as a restitution fine of between two hundred and ten thousand dollars and restitution to the victim in this case."

In these circumstances, there is no possibility defendant "reasonably could have understood the negotiated plea agreement to signify that no substantial fine[s] would be imposed." (*In re Moser, supra*, 6 Cal.4th at p. 356.) To the contrary, defendant expressly stated he understood the fines, up to the statutory maximum, would be part of his sentence if he entered his plea of no contest to count one in return for dismissal of the other counts. Further, when defendant did move to withdraw from the plea agreement, he did not include a claim that fines were not permitted, even though the probation officer's report was before the court recommending imposition of the entire list of fines.

Accordingly, we conclude the sentence imposed on defendant did not violate the terms of the plea agreement.

As noted, a defendant is entitled to be advised of the direct consequences of his guilty plea, and in this case the court failed to advise defendant the section 290.3 fine would be imposed upon him. The failure, however, was not prejudicial. (See *People v. Walker* (1991) 54 Cal.3d 1013, 1022-1023.) Defendant was informed fines in excess of \$20,000 could be imposed upon him. In fact, even considering the stayed fine, the total of all fines imposed was \$16,200, far less than that maximum. It is implausible to assert that a defendant would reject an otherwise favorable plea agreement because \$200 of the fine permitted under the agreement was to be denominated a “section 290.3” fine instead of a “restitution fine.”

Finally, respondent agrees we should strike the open-ended requirement defendant pay the cost of the “SART” exam. Section 1203.1h, subdivision (b), which authorizes assessment of the fee, contains detailed provisions for individualized determination by the trial court of the amount to be paid by a defendant.<sup>3</sup> In the absence of such a determination, the fee is not properly imposed. (*People v. Wardlow* (1991) 227 Cal.App.3d 360, 371-372.)

### **Disposition**

The requirement that defendant pay the cost of the SART exam is reversed; in all other respects, the judgment is affirmed.

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<sup>3</sup> Section 1203.1h, subdivision (b), provides in part: “If the court determines that the defendant has the ability to pay ... the court may set the amount to be reimbursed and order the defendant to pay that sum to the law enforcement agency .... In making the determination of whether a defendant has the ability to pay, the court shall take into account the amount of any fine imposed upon the defendant and any amount the defendant has been ordered to pay in restitution.”